ONG BOON POK REALTY CO. PTE. LTD.

v.

CHIANG HONG PTE. LTD.

HIGH COURT, SINGAPORE
TS SINNATHURAY J
[SUIT NO. 2631 OF 1976]
29 JANUARY 1982

CONTRACT: *Sale/purchase agreement - Residential property - Sale conditional to government approval - "Side" letter in addition to agreement that deposit refundable if approval not given - Effect - Purchaser refused to make 2nd payment until approval - Whether purchaser in breach - Time essence of contract - Completion date of sale lapsed application for approval not considered - Reply after contract lapsed - Whether purchaser had taken alternate steps to obtain approval - Claim for refund of deposit - Whether purchaser entitled to refund - Counter-claim for specific performance and damages.*

The plaintiffs had negotiated with the defendants to purchase the defendants' residential property for a sum of $2.6 million. The plaintiffs paid a deposit of $260,000.

However, thereafter the Government issued a Statement on Future Restrictions of Ownership of Residential Properties which, required "...Companies written approval of the Government to purchase residential property...".

The parties then executed the Sale and Purchase Agreement (Agreement) whereby the purchase price was reduced to $2.4 million. The plaintiffs' solicitors also obtained confirmation from the defendants' solicitors on the contents of a 'side letter' which stated, *inter alia*, that the Agreement is signed on the basis that the Government will approve the application and in the event the Government rejects the application the deposit $260,000 will be refunded to the plaintiffs.

Time was of the essence in the Agreement.

Approval by the Government was only given after the date of completion of the sale, subject to a condition imposed on the plaintiffs by the Government.
The plaintiffs maintain that as the Government's approval was not obtained by the completion date, there never was any binding contract, and they are therefore entitled to the return of the deposit.

The defendants deny that the sale was a conditional sale. They counterclaim for specific performance and for damages for breach of contract.

Held:

[1] In allowing the plaintiffs' claim the Court was of the view that the "side" letter had converted the Agreement from an unconditional contract. The condition was that there was no contract under the Agreement until the Government gave its approval for the plaintiffs to purchase the property.

[2] As the condition was not fulfilled by the completion date, there was never a binding contract between the parties.

[3] The Court was satisfied that the plaintiffs had taken all reasonable steps to obtain the approval of the government to purchase the property. Also, it was no fault of theirs that approval was not given by the government before the completion date or within a reasonable time thereafter.

[4] Since approval was not granted by the government for the plaintiffs to purchase the property and the date for completion, for which time was the essence, had lapsed, there was no binding contract between the parties.

[5] The plaintiffs were therefore entitled to the refund of the deposit sum of $260,000 paid by them to the defendants under the Agreement.

[Plaintiffs' claim allowed with costs and interest at 8% p.a. from 16.5.74 to date of judgment and costs. Defendants' counterclaim dismissed with costs.]

JUDGMENT

TS Sinnathuray J:

In this action, the plaintiffs claim for the return of the deposit of $260,000 with interest thereon paid by them to the defendants under a contract for the sale and a purchase of a residential property. The plaintiffs say that the sale was subject to the condition that the Government will give its approval to the plaintiffs for the purchase of the property within the time thereafter. The defendants deny that the sale was a conditional sale. They counterclaim for specific performance and for damages for breach of contract.

The plaintiffs, Ong Boon Pok Reality (Pte) Ltd., a family development company, were incorporated in Singapore in December 1957. All the shareholders and directors of the company have been and are Singapore citizens. At all material times, the company held a housing developers' licence under the Housing Developers (Control and Licensing) Act (Cap 250).

The governing director Mr. Ong Boon Pok died in February 1972. One of his sons, Mr. Ong Cheng Soon, became the managing director of the company. In September 1973, he signed the contract for sale and purchase of the property for the Company. He resigned from the company in November 1977. Another brother, Mr. Ong Cheng Leong then took over the management of the company. In his evidence Mr. Ong Cheng Leong said that he did not know the whereabouts of his brother, Mr. Ong Cheng Soon. He believed that his brother was in Australia. I mention these facts here at the beginning, to dispose of them as nothing turns on the evidence of Mr. Ong Cheng Leong, or on the fact that Mr. Ong Cheng Soon was not available to give evidence. As was submitted by Mr. Price for the defendants, the oral evidence given at the trial is of negligible effect. The case concerns the construction of the contract and certain other documents.

The defendants, Chiang Hong (Pte) Ltd., are the owners of the property. The land in the District of Tanah Merah Kitchil has an area of 108,561 sq ft. or 10085.66m². On the land is a substantial two-storey bungalow house built in 1952, referred to as No. 306 Upper East Coast Road.

In August 1973 the plaintiffs' solicitors, Messrs Foo & Quek negotiated with the defendants' solicitors, Messrs Rodrigo and Tock, for the plaintiffs to purchase the property. The plaintiffs paid a deposit of $260,000 being 10% of the purchase price of $2.6 million offered by the plaintiffs. The sale was subject to contract.

On September 1973, the Government issued a Statement on Future Restrictions of Ownership of Residential Properties (the Government Statement). It was published in the Straits Times and other newspapers the next day. For the purpose of this case, it is sufficient to refer to the following matters in the Government Statement:

> Legislation will, therefore, be introduced and enacted, to take effect that as from tomorrow, 11th September 1973, only citizens of Singapore can purchase residential property without any restriction. All others - permanent residents, non-citizens and companies incorporated in Singapore or abroad - will not be debarred from owning residential property. But they will require the written approval of the government to purchase residential property or any vacant land, other than that already zoned industrial-commercial ...
>
> Many residential properties are held in the name of limited companies, the shares of which are owned by citizens and non-citizens. Such limited companies holding both industrial-commercial properties, plus residential properties, will be given a grace period of a few years to sort out their properties between industrial-commercial which can be owned by anyone and residential which can be owned by citizens or approved persons only. One solution could be for the memorandum and articles of association of the limited company to be amended, so that only citizens can be shareholders or directors. Or, the holdings could be split into two companies, a first company whose shares can be held by anyone, and therefore cannot own residential land, and a second company whose shareholders and directors can be only citizens or approved persons and can own residential land ...
>
> However, all persons and limited companies, comprising citizens or non-citizen shareholders or directors, formed to develop and construct residential houses for sale to citizens, will be encouraged to undertake such projects. They will be allowed to purchase residential land for such development and sale, or tender for Urban Renewal condominium projects.

It is not necessary in these proceedings to consider in any detail the effect the Government Statement had on the heated property market at that time. It is sufficient to say that there was a break in the market, followed by a sharp fall in residential property values. By May 1974, the drop was about 50%. Residential property values continued to fall till about the end of 1976. They levelled off in 1977. It was therefore regarded by the parties that the Government Statement had materially affected them, particularly the plaintiffs as it impinged on their capacity to contract to purchase the property.

The parties executed the agreement for sale and purchase (the Agreement) on 24 September 1973. The purchase price was reduced to $2.4 million but the deposit remained the same. On that day too, at about the time of the execution of the Agreement, the plaintiffs' solicitors obtained from the defendants' solicitors confirmation of the contents of the following letter (the side letter):

> September 24, 1973
>
> M/s. Rodrigo & Tock
> Singapore
>
> Dear Sirs,
>
> **Re: No. 306 Upper East Coast Rd.**
>
> We thank you for your letter of the 22nd instant and the enclosures therein.
>
> In view of the recent announcement by the Government restricting the ownership of residential land by non-Singapore citizens and companies, the Agreement for Sale and Purchase is signed on the basis that the Government will approve our clients' application to purchase the abovementioned property. In the event the Government rejects our clients' application the deposit of $260,000/- will be refunded to our clients forthwith. Please confirm.

Yours faithfully

Sgd. Foo & Quek

We confirm

Sgd. Rodrigo & Tock
24.9.73

The dispute between the parties is as to the proper construction of the terms in the side letter.

It is convenient to set out here the material terms of the Agreement relevant to the consideration of the side letter. They are as follows:

"3. Special Conditions

(1) The Purchaser shall pay to the Vendor the sum of Dollars Two hundred and sixty thousand $260,000 by way of deposit on the purchase price on the signing of this Agreement and the same shall be released to the Vendor on the 25 September 1973.

(2) It has also been agreed between the parties hereto that the Purchaser shall make a further payment to the Vendor for the sum of Dollars Nine hundred and forty thousand $940,000 on or before the 15th January, 1974.

(3) The purchase shall be completed on or before the 15 May, 1974, and the balance of the purchase money amounting to Dollars One million two hundred thousand $1,200,000 shall be paid at the office of M/s. RODRIGO & TOCK of No. 63-D, Telok Ayer Street, Room 3 (4th floor), on or before the 15 day of May, 1974.

(6) The sale is sold subject to the following conditions:-

(3) Time for completion of the above is the essence of the contract herein.

Reverting to the events, on 27 September 1973, the plaintiffs' solicitors, Messrs Foo & Quek wrote to the Registrar of Titles:

> Our client has entered into an Agreement on the 24 day of September 1973 to purchase the abovementioned property (residential property) subject to the Government approving our client's application to purchase the said property. It is our client's intention to develop the said property. We shall, therefore, be much obliged if you will kindly confirm our client is an approved company permitted to own this piece of residential land.

On 15 October 1973, the Registrar replied that the plaintiffs' application could not be considered as the Approval Committee for dealing with applications as that of the plaintiffs has not yet been formed. In her letter, the Registrar also inquired whether the plaintiffs were interested in altering the Memorandum and Articles of Association of the Company to restrict the entire membership and directorship of the Company to only Singapore citizens and also to provide that such alteration shall remain immutable.

At first the plaintiffs did consider amending their Memorandum and Articles of Association as suggested in the Registrar's letter. On 15 December 1973, the Registrar advised the plaintiffs' solicitors of the kind of special resolution that would be required to amend the Memorandum and Articles. The Registrar requested the solicitors to send to her the draft of the Special Resolution of the company for her approval.

Then there was a change of mind on the part of the plaintiffs. On 22 March 1974, the plaintiffs' solicitors informed the Registrar that the board of directors of the plaintiffs was not prepared to amend the Memorandum and Articles of Association of the company to restrict future membership to Singapore citizens only. The Registrar replied on 16 May 1974:

> In view of the fact that your clients are not agreeable to amend their Memorandum and Articles of Association to provide that all members and all directors shall be citizens of Singapore I have, therefore, referred this case to the Ministry of National Development. Could you please write to the Controller of Housing on this mater.

The date for completion of the purchase under clause 3(3) of the Agreement had lapsed the day before, on 15 May 1974.

As between the parties, whenever the defendants' solicitors made enquiries from the plaintiffs' solicitors, the latter kept the former informed of the stage at which the application was being considered by the Registrar of Titles. On 9 January 1974, the defendants' solicitors wrote to the plaintiffs' solicitors that they wanted payment of the sum of $940,000 under clause 3(2) of the Agreement which was due on 15 January 1974. As for the balance of $1.2 million due on the completion date, they said that it could be retained by the plaintiffs pending the approval of the Government. This letter gave rise to a legal argument between the solicitors.

For the plaintiffs, Messrs Foo & Quek, in their letter dated 30 January 1974 contended that until such time as the plaintiffs' application is approved none of the clauses of the Agreement operates as otherwise the plaintiffs would be a party to an offence. Messrs Rodrigo & Tock for the defendants in their letter of 4 February 1974 stated their case thus:

> We do not dispute that the sale of the above to your clients is subject to the government's approval of your clients as purchasers. The terms of the Agreement for Sale will still be operative in so far as the second payment is concerned except for the balance payment of the 50% of the purchase price which will be in abeyance pending the government's approval before completion can take place.
>
> Should permission for the purchase of the above property is refused by the government, it will follow therefore that all payments made before completion (50% of the purchase price, that is, if the second payment is made by your clients) will be refundable to your clients.
>
> In the circumstances, our clients have instructed us to demand payment of the sum of $940,000/- being the second payment forthwith from your clients ...

In another letter on 14 February 1974, Messrs Rodrigo & Tock said:

> If payment is not made your client is in breach of the Agreement and it is our clients' option to bring proceedings for specific performance and damages. Your client's deposit will in the latter event of course be forfeited.

The plaintiffs never made payment of the sum of $940,000, and the defendants took no action.

On 19 April 1974, the defendants' solicitors inquired of the plaintiffs' solicitors whether the plaintiffs had obtained the necessary approval to purchase the property. They remained the plaintiffs' solicitors that the date for completion was 15 May 1974. On 14 May the plaintiffs' solicitors replied that no approval has as yet been given. This led to another round of legal arguments between the solicitors.

On 22 May 1974, Messrs Foo & Quek wrote to the other side:

> ... since approval has not been granted by the Government for our clients to purchase the abovementioned property and the date of completion (time being of the essence) has lapsed the Contract is null and void. Under the circumstance please advice your clients to refund us the 10% deposit immediately.

Messrs Rodrigo & Tock replied on 25 May 1974. In their letter they took a completely different stand from the one they had taken earlier. They said:

> ... our clients can neither agree with nor accept your clients' contention that since approval has not been granted by the Government for your clients to purchase the abovementioned property and that the date of completion (time being the essence) has lapsed, the Contract is null and void.
>
> First, it should be understood that the Agreement for Sale and Purchase was signed 'on the basis that the Government will approve...' and **not** 'subject to the Government approving...'
>
> Secondly, the government authority has not yet disapproved your clients' application to purchase the above property.
>
> Thirdly, there is no indication that you have taken the necessary measures to render your clients eligible to purchase the above property such as amending the Memorandum & Articles of Association of the Company.

One would have thought that in these letters the issues between the parties had crystallised, and Court proceedings would have begun. But no step was taken in that direction. Instead there were further exchanges of correspondence between the solicitors, them and the Registrar of Titles on which nothing turns, and between the plaintiffs' solicitors and the Controller of Housing (the Controller).

On 28 November 1974, a little over six months after the date for completion had passed, the plaintiffs' solicitors wrote to the Controller. Reading the correspondence between the solicitors, it seems to me that the plaintiffs did so because in the last quarter of 1974 the defendants' solicitors sought to extend the time to complete the purchase of the property. The plaintiffs' solicitors however did not respond to the notice of extension of time. Nevertheless, as I have said they wrote to the Controller as follows:

> We have written to the Registrar of Titles, Land Dealings (Approval) Unit, for permission for our clients to purchase the abovementioned property. However, since the property is to be purchased for development we have been informed by the Registrar of Titles to apply to you for permission. Will you please let us know whether approval will be given to our clients to purchase the above property.

On 30 January 1975 the Controller approved the plaintiffs' application to purchase the property for the purpose of developing residential units, subject to three conditions, one of which was that the plaintiffs provide a bank guarantee to guarantee payment to the Government a sum of $960,000 equivalent to 40% of the purchase price of the property in the event that the plaintiffs do not diligently proceed with the development. The plaintiffs' managing director, Mr. Ong Cheng Soon, endeavoured to obtain a bank guarantee from four banks in which the plaintiffs had accounts. None of the banks was prepared to give the required guarantee. The plaintiffs' solicitors then applied to the Controller for the requirement of the guarantee to be dispensed with. On 24 March 1975 the Controller told the plaintiffs' solicitors that unless the bank guarantee was furnished the application to purchase the property cannot be approved.

Still on the facts, lastly, there was the final exchange of letters between the solicitors for the parties. The plaintiffs' case is set out in the letter of Messrs Foo & Quek dated 4 December 1975. In the letter, the solicitors made reference to the Agreement, the side letter and the Government Statement. They then said:

> It is therefore clear (from them) that the intention of parties was that the purchasers were to apply for the written approval and all they need to do when making such an application was to state that they intended to purchase the residential land to develop and construct residential houses for sale to citizens. It was never an expressed or implied term or condition of the agreement that the purchasers were required to amend their memorandum and articles of association to restrict the membership and directorship of the company to Singapore citizens only or to give an undertaking and guarantee as are now required by the Controller of Housing. Our clients' application for written approval have been unsuccessful in that conditions for approval not mentioned in the Government Statement of 11th September 1973, are now being imposed and our clients are not prepared or in a position to comply with all these conditions.
>
> Accordingly, it is our view that the abovementioned contract shall be deemed to have no effect and that the $260,000 hitherto paid by our clients to your clients shall have to be refunded to our clients forthwith. We are, therefore, instructed to and do hereby demand the return of the $260,000 immediately.

As for the defendants, Messrs Rodrigo & Tock in their reply on 27 January 1976 joined issue with the plaintiffs and maintained that:

> Under the terms of the agreement your clients' obligation to purchase the above property was subject to the Government approving their application to purchase such property. It was an implied term of the agreement that your clients were to take all reasonable steps to obtain such approval and in our view your clients failed to do this.

So much then for the facts and the contending claims of the parties. As was submitted by Mr. Dillon for the plaintiffs in his closing address, there can be no doubt that had the Agreement stood alone, without the side letter, it would have created an immediate binding and unconditional contract for the sale of the property by the defendants to the plaintiffs at the price of $2.4 million. Had that been the case, subject to title being properly deduced, under clause 3(2) of the Agreement, the plaintiffs would have paid to the defendants the further payment of $940,000 on or before 15 January 1974; and, under clause 3(3) the purchase would have been completed and the balance of $1.2 million would have been paid to the defendants' solicitors on or before 15 May 1974. There would also have been no argument between the parties that under clause 3(6)(3) of the Agreement time for completion of the purchase is of the essence of the contract.

But in this case, Mr. Price for the defendants has argued that because the term time for completion being of the essence of the contract is in paragraph (3) of clause 3(6), paragraph(3) only applies to matters dealt with in paragraphs (1) and (2) of clause 3(6). He argued that paragraph (3) of clause 3(6) has no application to clause 3(3) that the purchase shall be completed on or before the 15 May 1974. With respect, as was submitted by Mr. Dillon, the argument makes nonsense of the Agreement.

Paragraph (1) of clause 3(6) provides that one of the conditions of sale is that the plaintiffs will get satisfactory replies to their requisitions. The other condition of sale in paragraph (2) of clause 3(6) provides for the contingency of the Government or other Competent Authority acquiring the property. It is clear from a reading of both these conditions of sale that they do not impose any time limit. In fact neither of them makes any reference to time at all. As

a matter of construction, therefore, the phrase "of the above" in paragraph (3) of clause 3(6) that time for completion is the essence of the contract refers not to paragraph (1) or (2) of clause 3(6) but is a reference to clause 3(3) that the purchase shall be completed on or before 15 May 1974.

Before I consider the side letter, it is relevant to recapitulate the reaction of the parties to the Government Statement. On the defendants' side, they were keen to get the proposed sale through. On the 11 September 1973, the day the Government Statement was published in the newspapers, the defendants' solicitors sent the Agreement to the plaintiffs' solicitors with a covering letter which said: "If you have no substantial amendments please treat them as faired copies...". On the other hand, it is not surprising that the plaintiffs' solicitors did not respond immediately. On 19 September 1973, they wrote as follows:

> In view of the recent announcement restricting *inter alia* ownership of residential land by companies we regret we are unable to advise our clients to sign the Agreement at this moment. Furthermore, we have been given to understand the Planning Department may also adopt new policies. Our clients' architects are making enquiries. As soon as the position is cleared we will revert to you.

And it was on 24 September that the parties executed the Agreement and the defendants confirmed the side letter.

The plaintiffs' case is that the side letter had the effect of making the existence of any binding contract under the Agreement conditional on the grant of Government's approval for the plaintiffs to purchase the property. They say that the effect of the side letter is that the parties had entered into the Agreement on the express understanding that it is not to become binding on either of them unless the condition set out in the side letter is fulfilled. They maintain that as Government's approval was not obtained by the completion date, there never was any binding contract, and the plaintiffs were immediately after 15 May 1974, and are now entitled to the return of the deposit of $260,000 paid by them to the defendants.

On the other hand, the case for the defendants is that the side letter had added a new contractual term to the Agreement. They contend that the new term is expressed in the sentence:

> In the event the Government rejects our clients' application the deposit of $260,000 will be refunded to our clients forthwith.

They further contend that this new term is introduced by the words in the side letter:

> ... the Agreement for Sale and Purchase is signed on the basis that the Government will approve our clients' application to purchase the abovementioned property.

In amplification of their contention they argue that these introductory words are not contractual words. In answer to the plaintiffs' case, they say that these words are not expressed in the language of a condition. In particular they maintain that the words "on the basis that the Government will approve" are not equivalent to "subject to the approval of the Government", but that they mean "on the assumption that the Government will approve". To summarize, according to the defendants, (i) the side letter did not make the Agreement a conditional contract, namely, that the sale and purchase was to go through only when the Government gave its approval for the plaintiffs to purchase the property; (ii) the side letter had created a term of the contract that the Agreement would be discharged only in the event that the plaintiffs' application for the purchase of the property was rejected by the Government; and (iii) on the facts the plaintiffs' application has not been rejected by the Government.

So, the questions that arise for consideration are as to the proper construction of the said letter, and following upon the construction as to the legal effect of the side letter on the Agreement. It is clear that in the construction of the side letter I must give effect to the intention of the parties " as expressed in, or to be implied from, language they have used." (per lord Jenkins in the *Aberfoyle* Case at page 124: see post.)

What then did the parties think they were doing, when at the time of the execution of the Agreement, they made the side letter? The key to the answer is found in the opening words of the all-important paragraph in the side letter: "In view of the recent announcement by the Government restricting the ownership of residential land by non-Singapore citizens and companies" which, of course, refers to the Government Statement. So it is, because of the Government Statement that the parties made the side letter. They therefore intended that the Government Statement be considered in the construction of the side letter.

The parties knew from the Government Statement that the written approval of the Government was required for the plaintiffs to purchase the property. They rightly concluded that the plaintiffs as the purchasers would have to make the necessary application. They also knew that the measures announced in the Government Statement were to have the force of law in that retrospective legislation will be enacted to give effect to them, but they did not know of the substance of the legislation. From the general guidelines in the Government Statement, they learnt that at least two routes were contemplated by which the plaintiffs could seek to get the approval of the Government. One way was for the plaintiffs to alter their Memorandum and Articles of Association to make provision in them that only Singapore citizens can be shareholders or directors of the Company. The other way was for the plaintiffs, as the company was a housing developer of long standing, to apply for approval to buy the property to develop and construct residential houses for sale to citizens. But as regards this route, it was envisaged that the Planning Department was going to adopt new policies. It was because of these circumstances that the plaintiffs were not prepared to enter into an unconditional contract as provided in the Agreement. They wanted the Agreement qualified by the side letter. The defendants confirmed the qualification.

As regards the content of the qualification, it seems to me that the controversy between the parties is as to the meaning of the phrase "on the basis" in the clause of the side letter "that the Government will approve" the plaintiffs' application to purchase the property. Equally, it seems to me that there would have been no dispute had the solicitors for the parties used the time honoured words hallowed by law "subject to", so that the clause in the side letter would have read: " ...the Agreement for Sale and Purchase is signed subject to Government's approval ...". But what of the word "basis"? As I understood it, it ordinarily means "foundation", and it includes the dictionary meaning "that by which the operation of anything is determined". Having regard to my earlier observations on the effect of the Government Statement on the side letter, I am of the view that both, the ordinary and dictionary meaning, can apply with equal force to the phrase "on the basis" as used in the side letter. By giving the ordinary meaning, the clause can read: "the Agreement for Sale and Purchase is signed on the foundation that the Government will approve", or that 'the foundation for the Agreement for sale and purchase is that the Government will approve" the plaintiffs' application to purchase the property. To give the dictionary meaning the clause may have to be recast to state that "the operation of the Agreement for Sale and Purchase is to be determined when the Government gives its approval", or that 'the Agreement for Sale and Purchase will not come into force until the Government gives its approval" for the

plaintiffs to purchase the property. In either case, in legal language the meaning I give to the phrase "on the basis" is equivalent to "subject to". For these reasons I reject the construction put by Mr. Price that 'on the basis" means "on the assumption".

As for the legal effect of the side letter, I am of the view that the side letter, by qualifying the Agreement in the way I have described, had converted the Agreement from an unconditional contract to a conditional contract. The condition is there is no contract under the Agreement until the Government gives its approval for the plaintiffs to purchase the property. It follows that as the condition has not been fulfilled, the defendants must refund to the plaintiffs the deposit of $260,000.

This brings me to say that once it is established that the Agreement read with the side letter had created a conditional contract between the parties, then the principles laid down by the Privy Council in *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* (1969) AC. 115 apply to the present case. In that case, Lord Jenkins who delivered the judgment said:

> But, subject to this overriding consideration, [he had referred to the intention of the parties] their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

Lord jenkins went on to explain at page 126 that:

> ... their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly, that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.

In the *Aberfoyle* case, the appellants entered into a conditional agreement to sell to the respondent a rubber estate. A clause in the agreement provided that the purchase was conditional on the appellants obtaining the renewal of certain leases so as to be in a position to transfer the same to the respondent, and if the appellants were unable to fulfil this condition the agreement shall become null and void, and the appellants shall refund to the respondent the deposits already made. Another clause in the agreement fixed the date for completion. The condition not having been fulfilled by that date (there was an extension of time which does not affect the application of the above principles), it was held that the respondent was entitled to the return of his deposits.

In the present case it is true that the conditional character of the side letter is not expressed as clearly as was provided in the agreement in the *Aberfoyle* case. It is also true that the side letter does not state specifically as did the clause in the agreement in that case that if the condition was not fulfilled the agreement ... shall be null and void. But I am not persuaded by Mr. Price that the differences distinguish the present case from the *Aberfoyle* case, for the reason I have given that once it is concluded that the true construction of the side letter read with the Agreement is that the facts in the present case are indistinguishable from the

facts in the *Aberfoyle* case. Both concern conditional contracts relating to the sale and purchase of land. Both contain stipulations fixing dates for the completion of the sales. The reasoning had in the *Aberfoyle* case must therefore apply to the facts in the present case that "until the condition is fulfilled there is no contract of sale to be completed." And in accordance with the third of the propositions enunciated in that case, in the present case too "the date so fixed must be strictly adhered to". There is one more similarity in the two cases. Like in the *Aberfoyle* case, there is a provision in the side letter for the refund to the purchaser of the deposit if for any reason the condition cannot be fulfilled. In the present case, as the condition was not fulfilled by the completion date, 15 May 1974, there never was a binding contract between the parties, and the plaintiffs are therefore entitled to the refund of the deposit of $260,000.

Next, if I am wrong in holding that the side letter was a condition precedent to the existence of a binding contract between the parties, then, as was contended for the defendants, the side letter had added a new contractual term to the Agreement the term being that in the event the Government rejects the plaintiffs' application, the deposit will be refunded to them. The submission for the defendants was that as there has been no rejection by the Government, the Agreement is still binding upon the parties, and the plaintiffs are not entitled to the refund of the deposit.

There is, as was submitted by Mr. Dillon, a short answer to this submission. The new contractual term that Government must give its approval for the plaintiffs to purchase the property , like the other terms in the Agreement must be governed by clause 3(6)(3) and clause 3(3) of the Agreement, the combined effect of which is time for completion of the purchase by 15 May 1974 is the essence of the contract. The fact is the approval of the Government was not given by 15 May 1974. As the contract could not be completed without Government's approval, and time was of the essence, the Agreement had ceased to bind the parties after the completion date. The plaintiffs are therefore entitled to the refund of the deposit they had paid to the defendants.

Finally, there was the submission for the defendants that it was an implied term of the Agreement that the plaintiffs were to take all reasonable steps to obtain the approval of the Government, and that they had failed to do so. Having regard to the decisions I have made, I can be brief. Mr. Dillon has countered it most persuasively and fully in his written reply.

There is his submission that as there is no binding contract between the parties until the condition is fulfilled, there was no contractual obligation of any sort on the part of the plaintiffs to obtain Government's approval before 15 May 1974. I am quite prepared to accept it as a proposition in common law. But I am not sure how equity would consider the matter had the plaintiffs altogether failed or unreasonably refused to make an application to obtain the approval.

In the present case however, I am satisfied, on the facts I have narrated that the plaintiffs had done all that was required of them to obtain the approval before 15 May 1974. I accept the letter of the plaintiffs' solicitors of 4 December 1975, the last letter written by them, that when one has reference to the Agreement, the side letter and the Government Statement, it is clear that the intention of the parties was that the plaintiffs were to apply for the approval of the Government to purchase the property, and all they had to do when making such an application was to state that they intended to develop and construct residential houses for sale to citizens which is in effect what they said in their letter to the Registrar of Titles on 27 September 1973, three days after the Agreement and the side letter were made. In their

letter to the defendants' solicitors the plaintiffs' solicitors pointed out that it was never an expressed or implied term or condition of the contract between the parties that the plaintiffs were required to amend their Memorandum or Articles of Association to restrict the membership and directorship to Singapore citizens only. The letter of the plaintiffs' solicitors is reinforced by the submission of Mr. Dillon that the plaintiffs were fully entitled to rely on their position as a housing developer, and it was entirely reasonable of them that they should refrain from taking the drastic and immutable step of changing the constitution of the Company because the Government Statement did encourage "all persons and limited companies, comprising citizen or non-citizen shareholders or directors, formed to develop and construct residential houses for sale of citizens ... to undertake such objects. They will be allowed to purchase residential land for such development and sale, or tender for urban Renewal condominium projects." Lastly, even after 15 May 1974, then the alternative route for the plaintiffs to apply route to the Controller of Housing had been worked out by the Government, the plaintiffs were not successful because conditions for approval not mentioned in the Government Statement were imposed on them. I accordingly find that the plaintiffs had taken all reasonable steps to obtain the approval of the Government to purchase the property. I also find that it was no fault of theirs at approval was not given by the Government before the completion late or for that matter, within a reasonable time thereafter.

For all these reason, I hold that once approval was not granted by the Government for the plaintiffs to purchase the property and the date for completion, for which time was of the sense, had lapsed, there was no binding contract between the parties. Accordingly, there will be a declaration at the plaintiffs are entitled to the refund of the deposit of $260,000 paid by them to the defendants under the Agreement dated 24 September 1973. I also make an order for payment of the sum of $260,000 together with interest at the rate of 8% per annum from 16 May 1974 to date of judgment and costs. It follows that the defendants' counterclaim for damages for breach of contract must be dismissed with costs.

Also found at [1982] CLJ 101